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No. 90-1802

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

NATIONWIDE MUTUAL INSURANCE COMPANY,
NATIONWIDE MUTUAL FIRE INSURANCE COMPANY, and
NATIONWIDE LIFE INSURANCE COMPANY,
Petitioners,

v.

ROBERT T. DARDEN,
Respondent.

On Writ Of Certiorari
To The United States Court
Of Appeals For The Fourth Circuit

BRIEF FOR PETITIONERS

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QUESTION PRESENTED

Whether an insurance agent, found by the district court to be an independent contractor at common law, is an "employee" for purposes of the Employee Retirement Income Security Act of 1974.

PARTIES TO THE PROCEEDING

The following statement is provided pursuant to Rule 29.1 of the United States Supreme Court Rules, which requires that this brief include a list of all parent companies, subsidiaries (except wholly owned subsidiaries) and affiliates of the Petitioners.

Petitioners are members of a group of corporations that includes commonly owned or managed stock and mutual insurance companies, mutual funds, and other companies. Ownership interests in these companies outside the corporate group are limited to the interests of mutual insurance policyholders and mutual fund stockholders. The following list sets forth the Petitioners, parent companies of the Petitioners, and mutual insurance companies and mutual funds affiliated with the Petitioners:

Nationwide Mutual Insurance Company
Nationwide Mutual Fire Insurance Company
Nationwide Life Insurance Company
Nationwide General Insurance Company
Nationwide Property and Casualty Insurance Company
Employers Insurance of Wausau A Mutual Company
Wausau County Mutual Insurance Company
NGC County Mutual Insurance Company
Farmland Mutual Insurance Company
NIF/Nationwide Money Market Fund
NIF/Nationwide Bond Fund
Nationwide Investing Foundation Fund
Nationwide Investing Foundation Growth Fund
Nationwide Corporation

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ROBERT T. DARDEN,
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BRIEF FOR PETITIONERS

OPINIONS BELOW

The initial opinion of the district court (Pet. App. 47a-50a)[1] was not reported. The opinion of the court of appeals (Pet. App. 32a-46a), which vacated and remanded that district court decision, is reported at

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[1] References to the appendix to the petition for certiorari are designated "Pet. App." References to the joint appendix are designated "JA," and references to the appendix to this brief are designated "A."

796 F.2d 701. The opinion of the district court on remand (Pet. App. 13a-31a) is reported at 717 F. Supp. 388. The second opinion of the court of appeals (Pet. App. 1a-12a) is reported at 922 F.2d 203.

JURISDICTION

The judgment of the court of appeals was entered on January 7, 1991. (Pet. App. 12a) A timely petition for rehearing with a suggestion for rehearing *en banc* was denied on February 22, 1991. (Pet. App. 51a-52a) The petition for writ of certiorari was filed on May 22, 1991, and was granted on October 15, 1991. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Section 3(6) of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1002(6) (1988), provides: "The term 'employee' means any individual employed by an employer."

Section 2 of ERISA, 29 U.S.C. § 1001 (1988), the statutory preamble entitled "Findings and Declaration of Policy," is reprinted in the appendix to this brief. (A-1a)

STATEMENT OF THE CASE

A. The Facts

Petitioners Nationwide Mutual Insurance Company, Nationwide Mutual Fire Insurance Company, and Nationwide Life Insurance Company ("Nationwide") contract for the distribution of insurance with insurance agents. (Pet. App. 33a) Nationwide's relationship with each agent is governed by an Agent's Agreement. (Pet. App. 33a) Since 1969, these Agreements have

provided for certain payments referred to as the Agent Security Compensation Plan ("ASCP"). (Pet. App. 3a)

Nationwide's relationship with Robert T. Darden ("Darden"), which began in 1960, was governed by eight successive Agent's Agreements, each of which specified that his relationship with Nationwide was that of an independent contractor. (JA 7) Darden's Agreements expressly provided that ASCP payments, otherwise payable after termination of his contractual relationship with Nationwide, would not be made if: 1) he engaged in the insurance business, in competition with Nationwide, within one year of the cancellation of the Agreement with Nationwide and within a twenty-five mile radius of his Nationwide business location; 2) he at any time after cancellation of the Agreement induced a Nationwide policyholder to cancel insurance coverage by Nationwide; or 3) he replaced any insurance contract in force with Nationwide or furnished the name of the policyholder to a competitor. (Pet. App. 48a)

Darden operated his insurance agency as an independent business. He selected and owned the building and equipment used in his business, and he maintained the building and equipment at his own expense. (Pet. App. 39a) Darden hired, fired, and compensated his own staff. Darden determined the hours he worked, and he received compensation from Nationwide (other than the ASCP) solely in the form of commissions, which he reported to the Internal Revenue Service as income from self-employment. (Pet. App. 39a-40a, 48a-49a) Darden selected his customers and the types of Nationwide insurance he focused on selling and was wholly responsible for the operation

of his insurance agency and its financial success or failure. (Pet. App. 48a-49a) Nationwide offered seminars for Darden and his employees concerning his insurance practices, as well as suggestions about making his insurance business more profitable; he was not, however, required to attend those seminars or to adopt Nationwide's suggestions. (Pet. App. 49a)

Darden placed a substantial amount of insurance business with Nationwide that he sold to poor insurance risks. (JA 45) Although Darden flourished from the commissions this business generated, Nationwide suffered significant losses through payment of the resulting claims. (Pet. App. 48a) Because Darden's business practices continued to cause Nationwide to sustain losses, in October, 1980, Nationwide exercised its right to terminate its relationship with Darden. (*Id.*) In December, 1980, Darden chose to reopen his insurance business at the same location he had previously used as a Nationwide agent, selling policies for Nationwide's competitors. (*Id.*) Darden mailed letters to each of the 1,200-1,500 customers he had represented while an agent for Nationwide, advising them that he represented other companies and would like to continue his service for them. (JA 51) Nationwide notified Darden that, because he had violated the terms of the Agent's Agreement, no ASCP payments would be made to him. (Pet. App. 3a-4a)

When his contract was terminated by Nationwide, Darden's net worth was approximately $450,000. He owned an annuity contract and an individual retirement account ("IRA"), but he had chosen to put most of his assets in other forms of investment, including real estate.[2]

[2] These assets included his residence (valued at approximately $120,000), several rental properties (valued at approximately $167,000), his office building (valued at approximately $62,000 net of a mortgage), eight life insurance contracts (with a total cash value of $22,300), mutual fund shares totalling $33,267, and bank deposits of approximately $27,000. Darden's annuity and IRA had values of $9,400 and $8,400, respectively. (Pet. App. 19a; JA 41)

B. The Proceedings Below

Darden brought an action in the United States District Court for the Eastern District of North Carolina, alleging that section 203 of ERISA, 29 U.S.C. § 1053, precluded enforcement of the terms of the Agent's Agreement and seeking to recover the ASCP payments and other relief.[3] The basic facts were not in dispute; after discovery, both parties moved for summary judgment. The case was referred to a magistrate, who recommended that summary judgment be granted for Darden. (Pet. App. 47a)

The district court rejected the magistrate's recommendation and granted summary judgment for Nationwide. (Pet. App. 47a-50a) That court considered " '[t]he total factual context' of Mr. Darden's relationship with Nationwide " in light of common law agency principles and determined that "Darden was an independent contractor and not an employee of Nationwide." (Pet. App. 50a)

[3] In pertinent part, section 203(a) provides that an "employee's" benefits under an "employee pension benefit plan" must vest at least as rapidly as under one of three specified schedules. To the extent that section 203 is applicable, the contractual limitations on ASCP payments may not be enforced against Darden. Darden has never claimed that the termination of his Agent's Agreement was improper, nor is there any dispute that his competition with Nationwide within one year of his termination violated the conditions set forth in the Agent's Agreement for receipt of any ASCP payments. (JA 40 Stip. ¶ 23)

On appeal, the Fourth Circuit agreed that "Darden most probably would not qualify as an employee" of Nationwide under traditional common law principles. (Pet. App. 39a) It stated, however, that "the common-law test for the relationship of master and servant is not the appropriate standard" for defining "employee" under ERISA, because "[i]n interpreting statutory language so as to define the class of persons protected by the statute, a court must take as its 'primary consideration' whether the inclusion of the disputed category of persons would effectuate the 'declared policy and purposes' of the statute." (Pet. App. 40a-41a) Quoting from ERISA's statement of purpose, the court of appeals concluded that Congress was concerned that "many employees with long years of employment are losing anticipated retirement benefits," that employee benefit plans "have become an important factor affecting the stability of employment and the successful development of industrial relations," and that Congress felt it desirable to enact minimum standards "assuring the equitable character of such plans and their financial soundness." (Pet. App. 41a.) The court of appeals found this statement provided "useful guidance in determining whether an individual who does not fit within the traditional concept of employee status should nonetheless be considered an employee in the context of ERISA." (*Id.*) From this statement, the Fourth Circuit derived a novel, three-part test for determining "employee" status under ERISA:

(1) Whether the claimant "had a reasonable expectation that he would receive the benefits," *i.e.*, whether the "employer" took some action that created a reasonable expectation on the "employee's"

part that retirement benefits would be paid in the future;[4]

(2) Whether the claimant "relied on this expectation," *i.e.*, whether the "employee" remained for "long years," or a substantial period of time, in the "employer's" service and forewent other significant means of providing for retirement; and

(3) Whether the claimant "lacked economic bargaining power to contract out of the forfeiture provisions." (Pet. App. 4a, 41a-42a & n.7)

After finding that the "expectation" element of its test was satisfied in this case, the Fourth Circuit remanded the case to the district court to determine Darden's status as an employee under the other two elements of the newly enunciated test. (Pet. App. 46a) Applying this test on remand, the district court held that Darden was Nationwide's "employee." Although Darden had the financial resources to reduce his reliance on ASCP payments for his retirement, the district court deemed only his annuity contract and IRA to be "financial planning for retirement," found that those two investments did not significantly lessen his reliance on Nationwide payments, and ruled that his reliance was reasonable. (Pet. App. 19a-20a) Accordingly, the district court held that Darden met the

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[4] The Fourth Circuit stated that the limitations on ASCP payments in the Agent's Agreement must be disregarded in making this inquiry, because "it is precisely that sort of employer-imposed condition on the employee's anticipation that Congress intended to outlaw" in ERISA and "[e]mployers may not circumvent that congressional purpose" by arguing that "[the claimant's] expectations were limited by forfeitability provisions." (Pet. App. 42a n.7)

reliance element of the Fourth Circuit's test. Addressing the "bargaining power" element, the district court concluded that Darden's relationship with Nationwide gave him "enough control over his own business activities" that he was *not* "considered an employee under the traditional common law standard," (Pet. App. 20a) but that he did not have sufficient power to bargain over the terms of that relationship. (Pet. App. 21a) On grounds unrelated to the "employee" issue, the district court held that a portion of the ASCP payments were not subject to ERISA. Accordingly, the court entered judgment in part for Nationwide and in part for Darden. (Pet. App. 17a, 31a)

Cross appeals were filed, and the Fourth Circuit affirmed the district court's decision. The Fourth Circuit relied on the test for determining "employee" status that it had previously announced, and again it rejected Nationwide's argument that "employee" status under ERISA should be determined under common law principles. (Pet. App. 5a-8a)[5]

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[5] In order for Darden to sustain his claim that section 203 of ERISA precludes enforcement of the contractual terms for ASCP payments, he must be an "employee," and the ASCP must be an "employee pension benefit plan" (or "pension plan") within the meaning of ERISA. (Pet. App. 4a) The ASCP provided for two forms of payment referred to as Extended Earnings and Deferred Income Incentive Credits ("DCIC"). The district court held that DCIC constituted a "pension plan" subject to the vesting provisions of ERISA, but that Extended Earnings did not. Accordingly, judgment was entered for Darden to the extent the claim pertained to DCIC and for Nationwide to the extent the claim pertained to Extended Earnings. (Pet. App. 31a) Nationwide appealed the district court's holdings that Darden was an "employee" and DCIC a "pension plan." Darden appealed

SUMMARY OF ARGUMENT

The Fourth Circuit's test for "employee" status was predicated not on the language or legislative history of section 3(6) of ERISA, but on that court's view that the term "employee" should be construed "in the light of the mischief to be corrected and the end to be obtained." (Pet. App. 40a) This Court, however, has concluded that the test for "employee" status under federal statutes is the common law test unless Congress has affirmatively expressed a contrary intent. *See Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 739-41 (1989). The three other courts of appeals that have considered the meaning of "employee" under ERISA since the Fourth Circuit announced its novel test have uniformly concluded that Congress intended the common law test to govern. *See Penn v. Howe-Baker Eng'rs, Inc.*, 898 F.2d 1096, 1101-02 & n.6 (5th Cir. 1990) (expressly rejecting the Fourth Circuit test); *Wolcott v. Nationwide Mut. Ins. Co.*, 884 F.2d 245, 250-51 (6th Cir. 1989) (same); *Holt v. Winpisinger*, 811 F.2d 1532, 1538 & n.44 (D.C. Cir. 1987).

"Employee" as used in ERISA is a word with an ordinary and settled meaning; that ordinary meaning is wholly at odds with the Fourth Circuit's analysis. This Court recognized in *Reid* that "employee" has

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the district court's holding that Extended Earnings was not a "pension plan." The Fourth Circuit affirmed the district court's judgment in all respects. In response to the petition for certiorari filed by Nationwide raising the "employee" issue, Darden filed a cross-petition seeking review of the status of Extended Earnings under ERISA, which was denied. *Darden v. Nationwide Mut. Ins. Co.*, 922 F.2d 203 (4th Cir. 1991), *cert. denied*, ___ U.S. ___, 112 S.Ct. 245 (Oct. 15, 1991) (No. 90-1953).

a settled meaning at common law and that a court must infer that Congress intended to adopt that meaning when it used that term without affirmatively expressing a contrary intent. Nothing in the text or the legislative history of ERISA expresses a contrary intent. The words used by Congress and the pertinent legislative history show only that Congress thought no special explanation was required.

The Fourth Circuit's implicit determination that the common law test was too restrictive to serve Congress' purposes in enacting ERISA is wholly without foundation. Prior to *Reid*, this Court, without a more specific mandate than the remedial purposes of the statute, twice construed the term "employee" to have other than the common law meaning. Congress unequivocally repudiated this Court's construction and amended the statutes to reaffirm the common law meaning. Against that history, Congress' use of "employee" in ERISA without a specific definition demonstrates that it intended the term to have its common law meaning.

The common law test distinguishes between employees and independent contractors on the basis of the extent of the hiring party's control over the worker, as revealed by all the circumstances of the relationship. In contrast, the Fourth Circuit test makes the worker's expectations, reliance, and bargaining power its exclusive focus. By making Darden's status as an independent entrepreneur virtually irrelevant, the Fourth Circuit gave the term "employee" a meaning Congress could not have foreseen, much less intended. Apart from its disregard for Congress' manifest intent, the test conceived by the Fourth Circuit is uncertain in application and unpredictable. Employers could not know in advance which of their workers would be subject to ERISA because employee status would ultimately depend on the nature and extent of investments for retirement made by each worker to whom retirement payments are promised, no matter how independent the business operations of that worker might be.

The common law test of employee status articulated by this Court in *Reid* should be applied to determine employee status under ERISA. Applying that test to the undisputed facts, Darden is not Nationwide's employee.

ARGUMENT

I. The Term "Employee" In ERISA Means An Employee As Defined By Common Law.

The dispositive issue in this case is whether Darden was an "employee" of Nationwide under section 3(6) of ERISA, because the vesting requirements of section 203(a), which the Fourth Circuit held forbid enforcement of the contractual limitations on ASCP payments, are applicable only to "employees" benefitting from "employee pension benefit plans." Section 3(6) states that "the term 'employee' means any individual employed by an employer."

The starting point for interpreting a statute is always "the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose." *Park 'N Fly, Inc. v. Dollar Park & Fly, Inc.*, 469 U.S. 189, 194 (1985). The Fourth Circuit disregarded this rule and departed from the ordinary meaning of "employee" when it defined that term by reference

only to a worker's expectation of future payments, reliance on that expectation, and bargaining power.

A. The Ordinary Meaning of the Term "Employee" Is Its Settled Meaning at Common Law.

This Court has held that when Congress uses the term "employee" without expressing a contrary intent, a court interpreting such a statute must infer that Congress incorporated the settled meaning of that word under the common law. *Reid*, 490 U.S. at 739-40. In *Reid*, this Court held that the common law definition governs the meaning of "employee" for purposes of the "work made for hire" provisions of the Copyright Act of 1976, under which the copyrights to "a work prepared by an employee within the scope of his or her employment" are generally owned by the "employer." 17 U.S.C. §§ 101(1), 201(b) (1988). Announcing an interpretive rule of general application, the Court determined that Congress intended the common law definition of "employee" to govern:

> It is . . . well established that "[w]here Congress uses terms that have accumulated settled meaning under . . . the common law, a court must infer, unless the statute otherwise dictates, that Congress means to incorporate the established meaning of these terms." *NLRB v. Amax Coal Co.*, 453 U.S. 322, 329 (1981); see also *Perrin v. United States*, 444 U.S. 37, 42 (1979). In the past, when Congress has used the term "employee" without defining it, we have concluded that Congress intended to describe the conventional master-servant relationship as understood by common-law agency doctrine. See, *e.g.*, *Kelley v. Southern Pacific Co.*, 419 U.S. 318, 322-323 (1974); *Baker v. Texas & Pacific R. Co.*, 359 U.S. 227, 228 (1959) (*per curiam*); *Robinson v. Baltimore & Ohio R. Co.*, 237 U.S. 84, 94 (1915).

490 U.S. at 739-40. Finding "[n]othing in the text" of the statute indicating a different meaning, *id.* at 740, the Court held that Congress intended the common law definition of employee to govern. *Id.* at 750-51.

The Court then articulated the factors that must be considered in determining employee status under the general common law:

> In determining whether a hired party is an employee under the general common law of agency, we consider the hiring party's right to control the manner and means by which the [desired result] is accomplished. Among the other factors relevant to this inquiry are the skill required; the source of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired party's discretion over when and how long to work; the method of payment; the hired party's role in hiring and paying assistants; whether the work is part of the regular business of the hiring party; whether the hiring party is in business; the provision of employee benefits; and the tax treatment of the hired party. See Restatement [Second of

> Agency] §220(2) (setting forth a nonexhaustive list of factors relevant to determining whether a hired party is an employee). No one of these factors is determinative.

490 U.S. at 751-52 (footnotes omitted). Under the rationale of *Reid*, this same test of common law employee status must also be applicable under section 3(6) of ERISA, because nowhere in ERISA did Congress express any contrary intent.[6]

B. Congress Expressed No Intent in ERISA to Depart from the Common Law Definition of "Employee."

Nothing in the text of any section of ERISA even suggests a meaning of "employee" other than its ordinary meaning under the common law. In defining "employee," Congress used the terms "individual," "employed," and "employer." ERISA § 3(6). The first two terms are not defined in the statute. "Employer" is defined in a way that does not suggest any intent to deviate from its ordinary meaning.[7] Congress' intent to incorporate the common law meaning is clear from the text of ERISA.

[6] As in *Reid* and the cases cited therein, 490 U.S. at 740, the ERISA employee test must be derived from the *federal* common law rather than the law of any particular state, particularly in light of ERISA's express objective of creating uniform national law by broadly preempting state laws relating to employee benefit plans. *See* ERISA § 514, 29 U.S.C. § 1144.

[7] *See* ERISA § 3(5), 29 U.S.C. § 1002(5):

> The term "employer" means any person acting directly as an employer, or indirectly in the interest of an employer, in relation to an employee benefit plan; and includes a group or association of employers acting for an employer in such capacity.

Although one need not resort to the legislative history of ERISA to construe section 3(6), that history confirms that Congress intended to adopt the common law test in defining the term employee. The only substantive discussion of the "employee" definition is a "technical note" that "[t]he definition of 'employee' is intended to encompass any person who has the status of an 'employee' under a collective bargaining agreement." S. Rep. No. 127, 93d Cong., 1st Sess. 15 (1973), *reprinted in* 1974 U.S.C.C.A.N. 4838, 4851; H. Rep. No. 533, 93d Cong., 1st Sess. 10 (1973), *reprinted in* 1974 U.S.C.C.A.N. 4639, 4648; 120 Cong. Rec. 3982 (1974). The National Labor Relations Act ("NLRA") specifically affords the right to engage in collective bargaining only to common law employees. *See* 29 U.S.C. §§ 152(3), 157 (1988).[8] Thus, the "technical note" is consistent with the use of the common law test to define employee for purposes of ERISA.

The Fourth Circuit did not (nor could it) cite anything in the text or legislative history of ERISA reflecting any intent by Congress to depart from the common law definition of "employee." The court of appeals relied solely on select portions of the statutory preamble,[9] which does not affirmatively address

[8] *See infra* at 20-21.

[9] The statutory preamble of ERISA is reprinted in its entirety in the appendix to this brief. (A-1a) The Fourth Circuit stated:

> The purposes of ERISA are explicitly set forth in § 2 of the Act, 29 U.S.C. § 1001. Congress was concerned that "many employees with long years of employment are losing anticipated retirement benefits." Because

the "employee" issue. The cited language—referring to the need to protect "employees" and the role of pension plans in "the stability of employment"—in fact reflects ERISA's concern with defining parties' rights and duties when pension and welfare benefits are provided pursuant to a conventional employment relationship. ERISA is *not* concerned with redefining the well-understood scope of that relationship.

C. Congress' Incorporation of the Common Law Test in ERISA Has Been Clear to Other Courts of Appeals.

The three other courts of appeals that have construed section 3(6) properly focused on the statutory language of ERISA. In *Holt*, the administrators of a pension plan declined to pay benefits to a plan participant on the grounds that her service was insufficient to meet the ten year vesting requirement of the plan. The employer had originally retained her as an "independent contractor" at a time when the employer had a policy against hiring part-time employees. The issue was whether the participant's first year of service, ostensibly as an independent contractor, was service as an "employee" and therefore could be counted toward satisfying the vesting requirement. 811 F.2d at 1534-35. The D.C. Circuit concluded:

> employee benefit plans "have become an important factor affecting the stability of employment and the successful development of industrial relations," Congress felt that it was desirable in the interests of the free flow of commerce, as well as in the interests of individual employees and their beneficiaries, to enact minimum standards "assuring the equitable character of such plans and their financial soundness."

(Pet. App. 41a)

> The absence of a comprehensive definition of "employee" in ERISA and other features of that legislation indicate plainly enough that Congress intended the Secretary of the Treasury and the Secretary of Labor, who were administrators of various ERISA provisions, to continue their practice of defining "employee" in terms of common law agency principles.

Id. at 1538 n.44. The court found that the Treasury Department's practice was to apply the "usual common law rules,"[10] noted that Treasury Department regulations implementing the vesting provisions of section 411 of the Internal Revenue Code also apply to the parallel vesting provisions of section 203 of ERISA, and observed that the Labor Department is prohibited from issuing inconsistent regulations. 811 F.2d at 1538 n.44, citing ERISA § 3002(c), 29 U.S.C. § 1202(c) (1988); H. Rep. No. 1280, 93d Congress, 2d Sess. 268 n.1 (1974), *reprinted in* 1974 U.S.C.C.A.N. 5038, 5050. The court also noted that the common

[10] The Internal Revenue Service applies the employment tax definition of common law employee under the tax qualification rules for pension plans, including the vesting provisions, *see, e.g., Professional & Exec. Leasing, Inc. v. Commissioner*, 89 T.C. 225, 231 & n.10 (1987), *aff'd*, 862 F.2d 751 (9th Cir. 1988) (IRS has generally relied on common law test to determine employee status); Rev. Rul. 68-303, 1968-1 C.B. 165, 166; Rev. Rul. 60-379, 1960-2 C.B. 156, 157-58, other than where Congress has enacted a specific exception. *See* Internal Revenue Code §§ 401(c) (self-employed persons), 414(n) ("leased" employees), 414(o) (other persons specified by regulation), 7701(a)(20) (full-time life insurance salesmen as defined in Code § 3121(d)(3)(B) and Treas. Reg. § 31.3121(d)-1(d)(3)).

law test is applied to determine employee status under the NLRA. 811 F.2d at 1538; *see infra* at 20.

The D.C. Circuit in *Holt* ruled that "all relevant circumstances are to be examined and evaluated," under the common law test, but that "the right of one party to control not only the result to be achieved by the other, but also the means and manner of performing the task," is the "most critical factor." 811 F.2d at 1539. Both the employer's "well-nigh unbridled control" over the worker, as well as her lack of specialized skills, use of the employer's premises and equipment, and compensation by an hourly wage, persuaded the court of appeals she was an "employee" at common law. *Id.* at 1539-41. *See also Mayeske v. International Ass'n of Fire Fighters*, 905 F.2d 1548, 1553-54 (D.C. Cir.), *cert. denied*, ___ U.S. ___, 111 S. Ct. 347 (1990) (applying the test articulated in *Reid* pursuant to the holding in *Holt* that the common law test governs under ERISA).

The reasoning of *Holt* has also been adopted by the Fifth and Sixth Circuits. *Wolcott* involved an issue identical to that in this case: whether a former insurance agent was Nationwide's "employee" and, therefore, entitled to ASCP payments by reason of ERISA's vesting requirements notwithstanding the contractual limitations on those payments. 804 F.2d at 249-50. In *Penn*, a structural designer was discharged as a regular employee and retained as an "independent contractor." The employer terminated its pension plan, and the issue was whether the designer was entitled to a fully vested pension by reason of being an "employee" at the time of the plan termination. 898 F.2d at 1098-99. The Fifth and Sixth

Circuits relied on the D.C. Circuit's reasoning in *Holt*, rejected the Fourth Circuit's test, and applied the common law test to determine employee status under ERISA. *Id.* at 1101-02 & n.6 ("We agree that because Congress provided no specific statutory definition of 'employee' under ERISA, we properly apply the common law of agency."); *Wolcott*, 884 F.2d at 250-51. Applying that test, both courts of appeals considered the right of control, together with a variety of other factors in holding that the claimants were independent contractors. *Penn*, 898 F.2d at 1102-03, citing *Reid*; *Wolcott*, 884 F.2d at 251.

D. The Common Law Definition of "Employee" is Consistent with the Purpose of ERISA.

Each time this Court has interpreted a statute as having a definition of "employee" broader than the common law definition and the only authority for such an interpretation was the general purpose of the statute, Congress has unequivocally reaffirmed that the common law definition was what it had intended.

In devising its test of employee status, the Fourth Circuit cited *United States v. Silk*, 331 U.S. 704, 713-14 (1947) (defining "employee" for purposes of the Social Security Act), and *NLRB v. Hearst Publications*, 322 U.S. 111, 120-21 (1944) (defining "employee" for purposes of the National Labor Relations Act). Both of those cases interpreted the term "employee" expansively in light of the perceived purposes of the legislation being interpreted. (Pet. App. 40a-41a) Although, the Fourth Circuit cited *Silk* and *Hearst*, it failed to consider Congress' reaction to each of those decisions; had it done so, it would have concluded that the common law definition of "employee" is consistent with the purpose of ERISA.

The NLRA originally defined "employee" by stating (in pertinent part) that the term included "any employee." Ch. 372, § 2, 49 Stat. 450 (1935), 29 U.S.C. § 152(3) (1940). This Court in *Hearst* reversed a determination that certain "newsboys" were not employees under the NLRA, stating that common law-concepts should not restrict the scope of the term "employee;" instead, the term should be "understood with reference to the purpose of the Act and the facts involved in the economic relationship." 322 U.S. at 129.

Congress responded by repudiating *Hearst* and amending the NLRA specifically to exclude from its coverage "independent contractors" as determined under the common law test. *See* Labor Management Relations Act, 1947, ch. 120, title V, § 501, 61 Stat. 161, 29 U.S.C. § 142(3) (1952); *NLRB v. United Ins. Co.*, 390 U.S. 254, 256 (1968). The legislative history of this amendment confirmed that the proper test was and had been the common law test:

> An "employee", according to all standard dictionaries, according to the law as the courts have stated it, and according to the understanding of almost everyone, with the exception of members of the National Labor Relations Board, means someone who works for another for hire .... It must be presumed that when Congress passed the Labor Act, it intended words it used to have the meaning that they had when Congress passed the act, not new meanings that, 9 years later, the Labor Board might think up [in its administrative decision in *Hearst*]. In the law, there always has been a difference, and a big difference, between "employees" and "independent contractors" .... It is inconceivable that Congress, when it passed the act, authorized the Board to give to every word in the act whatever meaning it wished. On the contrary, Congress intended then, and it intends now, that the Board give to words not far-fetched meanings but ordinary meanings. To correct what the Board has done, and what the Supreme Court, putting misplaced reliance upon the Board's expertness, has approved, the bill excludes "independent contractors" from the definition of "employee".

H. Rep. No. 245, 80th Cong., 1st Sess. 18 (1947), *reprinted in* 1 NLRB, Legislative History of the Labor Management Relations Act, 1947, at 292, 309 (1948).

Silk provoked a similar response. The Social Security Act originally defined "employee" only by stating that the term "includes an officer of a corporation." Ch. 531, title XI, § 1101, 49 Stat. 647 (1935), 42 U.S.C. § 1301(a)(6) (1940), Internal Revenue Code §§ 1426(d), 1607(i) (1940). This Court gave additional content to that definition in *Silk* and its companion case, *Bartels v. Birmingham*, 332 U.S. 126 (1947). In *Silk*, the Court held that certain truck drivers were independent contractors but that certain "unloaders" of coal from railroad cars were "employees" under the Act. In *Bartels*, the Court held that certain dance band members were not "employees" of the dance halls where they played. Although the Court considered many of the factors of "employee" status developed under the common law standard, *see Bartels*, 332 U.S. at 130-32; *Silk*, 331

U.S. at 716-19, it also suggested that technical insistence on a common law standard of control should not constrain application of the Social Security Act in light of the social ends Congress sought to achieve. *See Bartels*, 332 U.S. at 130; *Silk*, 331 U.S. at 710-14. The Court then concluded that "those who as a matter of economic reality are dependent upon the business to which they render service" should be treated as "employees." *Bartels*, 332 U.S. at 130; *see Silk*, 331 U.S. at 713-14.

In response to these decisions, the Treasury Department and the Federal Security Agency proposed new regulations to embody this "economic reality" test.[11] Before those regulations could take effect, however, Congress repudiated them by confirming that the statutory definition of "employee" included only those individuals who satisfy the "usual common law rule." Social Security Act, ch. 468, § 1(a), 62 Stat. 438 (1948) (current version at 42 U.S.C. § 410(j)(3) (1988), Internal Revenue Code §§ 1402(d)(2), 3121(d)(2)); *see Enochs v. Williams Packing & Navig. Co.*, 370 U.S. 1, 3 (1962). The legislative history stated:

> The joint resolution would reaffirm the unbroken intent of Congress that the usual common-law rules, realistically applied, shall continue to be used to determine whether a person is an "employee" for purposes of applying the Social Security Act.
>
> * * *
>
> The pending resolution will maintain the

[11] 12 Fed. Reg. 7966 (1947).

> moving principles of the decisions of the United States Supreme Court in the Silk, Greyvan, and Bartels cases where, in the opinion of your committee, the Court realistically applied the usual common-law rules. But if it be contended that the Supreme Court has invented new law for determining an "employee" under the social-security system in these cases, then *the purpose of this resolution is to reestablish the usual common-law rules, realistically applied.*

S. Rep. No. 1255, 80th Cong., 2d Sess. 1-2 (1948), *reprinted in* 1948 U.S.C.C.A.N. 1752, 1753 (emphasis added). Thus, in the context of a statute, the remedial purpose of which could hardly be stronger, Congress squarely rejected the notion that such purpose required the common law test of employment to be expanded. Congress rejected the definition in the proposed regulation, because its "basic principle—economic reality—. . . is a dimensionless and amorphous abstraction," and reaffirmed the common law standard, which reflects "established standards of law which frame and limit its application." *Id.* at 12, *reprinted in* 1948 U.S.C.C.A.N. at 1764.[12]

The device used by the Fourth Circuit to justify its test—an implicit finding that the common law test is too restrictive to effect the purposes of ERISA—is wholly without foundation. As under the NLRA and the Social Security Act, the purpose of ERISA is evident from its operative provisions: to afford certain rights to "employees." The scope of that term, as

[12] This history is reviewed in *United States v. W.M. Webb, Inc.*, 397 U.S. 179, 182-90 (1970).

intended by Congress, is clear from the text and legislative history of ERISA. The common law test of employee status is in total harmony with the purposes of ERISA.

The history of Congress' use of the term and the interpretive principle established in *Reid* show that Congress dictated use of the common law standard for determining employee status under ERISA. By seeking an "employee" definition in the purposes of ERISA, the Fourth Circuit disregarded the ordinary meaning of the text of section 3(6). That court usurped the function of Congress[13] and in that process conceived an erroneous meaning for the term "employee." This Court should correct the Fourth Circuit's error.

II. The Fourth Circuit Test Produces Untenable and Unpredictable Results.

A. The Test Abandons the Fundamental Distinction Between Employees and Independent Contractors.

The Fourth Circuit correctly observed that the "principal element of the common law standard is the

[13] In contrast, this Court has consistently enforced the terms of the statute and has declined to modify judgments made by Congress in enacting ERISA. *See, e.g., Guidry v. Sheet Metal Workers Nat'l Pension Fund*, 493 U.S. 365 (1990) (declining to create an exception to the unqualified ERISA prohibition on the assignment or alienation of benefits for employee malfeasance or criminal misconduct); *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 117-18 (1989) (declining to expand statutory definition of "participant" beyond its "natural reading" to reach claimants without a colorable entitlement to benefits); *Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134 (1985) (declining to expand ERISA statutory remedies for improper or untimely processing of benefit claims to include extra-contractual damages).

extent of one party's right to direct and control the performance of the other." (Pet. App. at 37a-38a) Under the common law, as in ordinary usage, employees differ from independent contractors, who agree only to accomplish results and retain control over the manner in which they attempt to do so. Restatement (Second) of Agency §§ 2, 220 cmt. e (1958). For example, in *Kelley v. Southern Pac. Co.*, 419 U.S. 318, 324 (1974), a case construing the Federal Employers Liability Act, this Court adopted the Restatement definition of common law "employee"[14] as a worker "who with respect to the physical conduct in the performance of the services is subject to the [hiring party's] control or right to control."[15]

This Court stated in *Reid* that the common law test considers "the hiring party's right to control the manner and means by which the [desired result] is accomplished," and enumerated a number of "other factors relevant to this inquiry." 490 U.S. at 751-52.[16] The hiring party in *Reid* did exercise some control over a sculpture being produced by an artist, but the Court cautioned that "the extent of control the hiring party exercises over the details of the product is not

[14] *See also Reid*, 490 U.S. at 752 n.31 ("In determining whether a hired party is an employee under the general common law of agency, we have traditionally looked for guidance to the Restatement of Agency.").

[15] *See also General Bldg. Contrac. Ass'n, Inc. v. Pennsylvania*, 458 U.S. 375, 393 (1982) (control is "central" to master-servant relationship); *Logue v. United States*, 412 U.S. 521, 527 (1973) (same); *Webb*, 397 U.S. at 192 (noting "primacy" of control); *Linstead v. Chesapeake & Ohio R. Co.*, 276 U.S. 28, 33-35 (1928) (treating control as dispositive).

[16] *See supra* at 13-14.

dispositive." *Id.* at 752. The artist in *Reid* was found to be an independent contractor because, *inter alia*, his occupation required skill, he supplied his own tools, and he worked in his own studio beyond the daily supervision of the hiring party. *Id.* at 752. The hiring party retained the artist for only a short period of time, during which the artist did not have to accept additional assignments, was free to decide when and how long to work, had total discretion in hiring and paying assistants, and was paid for completion of the job (not time spent on it). *Id.* at 752-53.

The common law test does not require that the extent of a hiring party's control be assessed with indifference to the circumstances affecting the working relationship. This Court has long recognized that Congress expects a "realistic" application of the common law test under federal statutes. *Webb*, 397 U.S. at 186 (reviewing legislative reaction to *Silk*, discussed *supra* at 22-23). *Reid* shows that the extent of the hiring party's control over the worker is revealed by the totality of those circumstances. Unlike the Fourth Circuit's test, the common law takes the circumstances of the parties' relationship into account within the framework of the sensible distinction between independent contractors, who promise only a result or reasonable efforts to deliver a result, and employees, who agree to perform services in the manner their employer directs.

By abandoning the common law test, the Fourth Circuit also abandoned this fundamental distinction[17]

[17] One court has questioned whether *any* worker promised a retirement benefit would fail to be treated as an "employee" under the Fourth Circuit test. *See Sica v. Equitable Life Assur. Soc'y*, 756 F. Supp. 539, 542 (S.D. Fla. 1990). In that case, an insurance agent *opposed* characterization as an ERISA "employee" because he sought remedies for denial of disability benefits under state law, which would be preempted if ERISA applied. The court rejected the Fourth Circuit test and adopted the common law test. *Id.* at 542.

and declared that "Darden's alleged status as an independent entrepreneur [had] little to do with the relevant inquiry . . . ." (Pet. App. 7a) Logically applied, the Fourth Circuit's test would treat owners of automobile dealerships, fast food franchises, and other retail distributors of goods or services primarily produced by another company as "employees" if they had the requisite expectations, reliance, and lack of bargaining power.[18] In so doing, the Fourth Circuit's test gives the term "employee" a meaning Congress could not have foreseen, much less intended, when it enacted ERISA.

B. The Test Is Uncertain in Application and Unpredictable.

In enacting ERISA, Congress had a particular concern that the law governing employee benefit plans be certain and predictable.[19] The Fourth Circuit's test

[18] The economic dependence of the contractor on the business is *not* the determinative factor under the common law test. As the Senate Finance Committee observed when it repudiated a proposed regulation that would have made "economic realities" the test for employee status under the Social Security Act, "[t]he rule, obviously, will not serve to make the necessary distinctions. Who, in this whole world engaged in any sort of service relationship, is not dependent as a matter of economic reality on some other person?" S. Rep. No. 1255, 80th Cong., 2d Sess. 10 (1948), *reprinted in* 1948 U.S.C.C.A.N. 1752, 1762, *quoted in Webb*, 397 U.S. at 187-88.

[19] This Congressional purpose is evident in the preemption provisions of section 514 of ERISA, 29 U.S.C. § 1144, which gen-

is at odds with that concern. The stated objective of that test was to permit the court to decide "whether an individual who does not fit within the traditional concept of employee status should nonetheless be considered an employee in the context of ERISA." (Pet. App. 41a) The test fails to impose principled restraints on that result-driven judicial determination. Such a test lacks the prospective certainty Congress intended.

The distinctions in "employee" status that the Fourth Circuit test might draw between frugal and spendthrift contractors compound the uncertainties of the test. The reliance element of the test [20] requires a determination whether the contractor *actually relied* on the expected payments to provide for retirement. (Pet. App. 6a-7a, 42a-43a) That reliance may vary significantly from contractor to contractor; from time to time it could even vary significantly as to any particular contractor. It is improbable that most businesses would have enough knowledge of their contractors' personal financial planning to make an advance determination of that reliance. Thus, insurance agents with whom Nationwide has identical working relationships would be treated differently under the Fourth Circuit's test based upon their individual in-

erally displace state law relating to employee benefit plans in favor of uniform federal law. *See, e.g., Fort Halifax Packing Co., Inc. v. Coyne*, 482 U.S. 1, 11 (1987); H. Rep. No. 533, 93d Cong., 1st Sess. 12 (1973), *reprinted in* 1974 U.S.C.C.A.N. 4639, 4650. That purpose is also implicit in the complex and detailed statutory provisions of this "comprehensive and reticulated" statute. *Nachman Corp. v. PBGC*, 446 U.S. 359, 361 (1980).

[20] As discussed *supra* at 7, this element considers whether the claimant relied on the future payments to provide for retirement.

vestment decisions and wealth. Such a result would be absurd. The Fourth Circuit's test would disrupt any certainty as to the scope of ERISA. It would also have the anomalous consequence of discouraging workers from establishing formal retirement arrangements, or otherwise saving for retirement, outside the workplace.

The common law test brings greater certainty to the "employee" issue, because it is an established standard that has been applied to innumerable factual situations for a variety of legal purposes. This body of precedent gives content and bounds to the common law standard.[21] Because of the long history of the actual application of this standard, it provides a predictability and certainty that the Fourth Circuit test cannot approach.[22]

[21] This predictability was important to Congress when it reinstated the common law rules under the Social Security Act. *See supra* at 23.

[22] The Fourth Circuit's unprecedented test of "employee" status may produce harsh results for affected individuals. For example, only a "self-employed individual" may establish the type of qualified plan commonly referred to as a Keogh plan. *See* Internal Revenue Code § 401(c)(1)(A). If insurance agents like Darden established Keogh plans but were determined to be "employees" rather than self-employed under the Fourth Circuit test, their Keogh plans might be disqualified and the agents subjected to back tax liabilities. In addition, Nationwide agents are not presently taxed on ASCP accruals because that promise is a general, unfunded obligation of Nationwide. *See generally* Rev. Rul. 60-31, 1960-1 C.B. 174. If the agents were found to be "employees" and the ASCP were otherwise subjected to ERISA, compliance with the ERISA trust, vesting and funding requirements might cause the agents to be taxed on those accruals in advance of actual receipt of ASCP payments. *See* IRS Notice

III. Darden Was Not Nationwide's "Employee."

The basic facts of this case as found by the district court are not in dispute:

> The plaintiff maintained an office in Spring Lake, North Carolina, at his own expense. The plaintiff was free to solicit insurance sales wherever, whenever, and from whomever he wished. The plaintiff was free to hire and fire his office help. The plaintiff paid his own business expenses. The plaintiff received compensation solely through commissions rather than as a salary from the defendants. The plaintiff was ineligible for such employee benefits as accident and health insurance, sick leave, vacation pay, jury duty pay, and employee pension or profit sharing plans. Nationwide withheld no taxes from the plaintiff's commissions. The plaintiff reported his own income, and paid taxes as an independent businessman. The plaintiff reported his commission income and business expenses on IRS forms prescribed for sole proprietorships. The plaintiff maintained an individual retirement account. Throughout all the agreements between the plaintiff and Nationwide, the plaintiff is listed as an independent contractor and not an employee. The plaintiff paid the fees for all his state agent's licenses. The plaintiff was free to incorporate his agency. He determined his own hours. Finally, it was primarily through the

87-13, Q&A-25, 1987-1 C.B. 432, 444 (discussing "section 457 plans," which are taxed on the same basis as the ASCP).

> plaintiff's own efforts, ingenuity, and good business sense that he made money, and not through any employment relationship with Nationwide.

(Pet. App. 48a-49a) Darden had the opportunity to provide for his retirement security through his own entrepreneurial efforts, and he in fact succeeded in developing substantial personal assets. (Pet. App. 20a)

Under the test of employee status articulated in *Reid* and applicable for purposes of ERISA, a court should consider "the hiring party's right to control the manner and means by which the [desired result] is accomplished" and other relevant factors including those enumerated by this Court. 490 U.S. at 751, quoted *supra* at 13-14. Taking into account Nationwide's right to control the sale of insurance by Darden and all the facts of his relationship with Nationwide, the district court found that Darden was not Nationwide's common law "employee."[23] (Pet. App. 48a-50a) When Darden appealed that judgment, the Fourth Circuit agreed that, under the common law test, "Darden most probably would not qualify as an employee." (Pet. App. 39a) Applying the test to the undisputed facts, Darden is not an "employee" of Nationwide.

[23] The district court's decision accords with the result in every other case that has applied the common law test to determine whether a former Nationwide agent was an "employee" for ERISA purposes. *See Wolcott v. Nationwide Mut. Ins. Co.*, 884 F.2d 245 (6th Cir. 1989); *Plazzo v. Nationwide Mut. Ins. Co.*, No. 88-4016 slip op. (6th Cir. Dec. 22, 1989) (per curiam) (Pet. App. 54a); *Sciara v. Nationwide Ins. Cos.*, No. 87-2815-4A (W.D. Tenn. March 30, 1990) (Pet. App. 59a); *Harlow v. Nationwide Mut. Ins. Co.*, No. N-84-503 (JAC) (D. Conn. June 19, 1987) (Pet. App. 68a).

CONCLUSION

The judgment of the court of appeals should be reversed and the case remanded to the court of appeals with instructions to enter judgment for Nationwide.

Respectfully submitted,

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APPENDIX

Employee Retirement Income Security Act of 1974

§ 2 Congressional findings and declaration of policy

(a) Benefit plans as effecting interstate commerce and the Federal taxing power

The Congress finds that the growth in size, scope, and numbers of employee benefit plans in recent years has been rapid and substantial; that the operational scope and economic impact of such plans is increasingly interstate; that the continued well-being and security of millions of employees and their dependents are directly affected by these plans; that they are affected with a national public interest; that they have become an important factor affecting the stability of employment and the successful development of industrial relations; that they have become an important factor in commerce because of the interstate character of their activities, and of the activities of their participants, and the employers, employee organizations, and other entities by which they are established or maintained; that a large volume of the activities of such plans are carried on by means of the mails and instrumentalities of interstate commerce; that owing to the lack of employee information and adequate safeguards concerning their operation, it is desirable in the interests of employees and their beneficiaries, and to provide for the general welfare and the free flow of commerce, that disclosure be made and safeguards be provided with respect to the establishment, operation, and administration of such plans; that they substantially affect the revenues of the United States because they are afforded preferential Federal tax treatment; that despite the enormous growth in such plans many employees with long years of employment are losing anticipated retirement benefits owing to the lack of vesting provisions in such plans; that owing to the inadequacy of current minimum standards, the soundness and stability of plans with respect to adequate funds to pay promised benefits may be endangered; that owing to the termination

of plans before requisite funds have been accumulated, employees and their beneficiaries have been deprived of anticipated benefits; and that it is therefore desirable in the interests of employees and their beneficiaries, for the protection of the revenue of the United States, and to provide for the free flow of commerce, that minimum standards be provided assuring the equitable character of such plans and their financial soundness.

(b) Protection of interstate commerce and beneficiaries by requiring disclosure and reporting, setting standards of conduct, etc., for fiduciaries

It is hereby declared to be the policy of this chapter to protect interstate commerce and the interests of participants in employee benefit plans and their beneficiaries, by requiring the disclosure and reporting to participants and beneficiaries of financial and other information with respect thereto, by establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans, and by providing for appropriate remedies, sanctions, and ready access to the Federal courts.

(c) Protection of interstate commerce, the Federal taxing power, and beneficiaries by vesting of accrued benefits, setting minimum standards of funding, requiring termination insurance

It is hereby further declared to be the policy of this chapter to protect interstate commerce, the Federal taxing power, and the interests of participants in private pension plans and their beneficiaries by improving the equitable character and the soundness of such plans by requiring them to vest the accrued benefits of employees with significant periods of service, to meet minimum standards of funding, and by requiring plan termination insurance.